Supreme Court, U. S.
FILED
NOV 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 79461

WATERBURY URBAN RENEWAL AGENCY,
Petitioner

vs.

WATERBURY ACTION TO CONSERVE OUR HERITAGE, INCORPORATED
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

November 26, 1979

JAMES E. HARTLEY, JR.
41 Church Street
Waterbury, Connecticut 06721
(203) 757-9261

WILLIAM J. SECOR, JR.
41 Church Street
Waterbury, Connecticut 06721
(203) 757-9261

TABLE OF CONTENTS

		Page
I.	Reply to Respondent's Statement of Case	5
II.	A Conflict Does Exist Between the Decision of the Second Circuit Court of Appeals and all Other Reported Cases	7
III.	The Petition Does Raise Questions of Federal Law so Substantial as to Require Review by the United States Supreme Court	8
IV.	A Decision in Favor of Petitioner on the Issue Raised Would Provide Petitioner with Relief	9

IN THE

Supreme Court of the United States

October Term, 1978

No. 79461

WATERBURY URBAN RENEWAL AGENCY,
Petitioner

vs.

WATERBURY ACTION TO CONSERVE OUR HERITAGE, INCORPORATED
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR HE SECOND CIRCUIT

I.

REPLY TO RESPONDENT'S STATEMENT OF CASE.

On Page 3 of Respondent's Brief, it is stated:

> "Under Sec. 108(A) of the Contract the Agency is required to promptly submit to HUD all data covering any proposed action of the Agency pertaining to the project. The acquisition of properties, the demolition of buildings and the approval of redevelopment projects and developers all require HUD's permission. This permission is necessary under Sec. 108(B) of the Contract to insure that the 'Agency shall not take any step which might in the opinion of the Secretary [of HUD], violate applicable Federal laws or regulations.' "

An examination of Section 108 of the Loan and Capital Grant Contract indicates that this statement is inaccurate.

Section 108(A) only requires the agency to submit data to HUD if the Secretary requests such data.

> "(A) Types of Project Data To Be Furnished. — The Local Public Agency **will promptly furnish the Secretary with such copies as he may reasonably require**, for his use under this Contract, of the following items covering actions then proposed to be taken by the Local Public Agency in its carrying out of, and which pertain to, the Project:" (emphasis supplied)

Section 108(A)

Loan and Capital Grant Contract

Section 108(B) provides that the local agency, after furnishing any items covered by and in accordance with Section 108(A), may have requested payments withheld; however, this only can occur when the Secretary has requested the information in accordance with Section 108(A).

The record in this case is barren of any evidence indicating that the Secretary requested any data under Section 108(A) concerning demolition, relocation or restoration of properties, and as a matter of fact, data was not requested by the Secretary.

The applicability of Section 108(B) is predicated upon the condition precedent of a request by the Secretary for information. Since none was made in this case, the statements of the Respondent are misleading and inaccurate.

On Page 3 of the Respondent's Brief, Respondent describes the buildings in the area as of classic turn-of-the-century main street types, representing Renaissance revival, Richardsonian romanesque, etc. The question before the Federal District Court was not:

> "Whether any buildings within the project area are deserving of preservation . . . Rather, the critical issue is whether the manner in which the government agencies exercise their discretion conformed with the requirements of federal law."

U.S. District Court Decision
Page 5

The U.S. Court of Appeals for the Second Circuit also did not make any finding relative to the architectural significance of the buildings within the project area.

The inclusion by the Respondent of information relating to the architectural significance of the buildings within the project area is self-serving and improper.

The remaining facts appearing on Pages 4, 5, 6 and 7 of Respondent's Brief are totally inapposite to the issue to be decided by this Court, namely whether Section 106 of the National Historic Preservation Act is applicable after the execution of the Loan and Capital Grant Contract.

II.

A CONFLICT DOES EXIST BETWEEN THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS AND ALL OTHER REPORTED CASES.

The Respondent's contention that no true conflict exists between the Second Circuit's decision and the decision of the other Courts of Appeal is erroneous.

The Second Circuit specifically negated such a position when it stated on Page 3287 of its opinion that:

> "Because our conclusion differs from that of most Courts that have addressed the question, our reasoning must be stated with care."

The Respondent, in cavalier fashion, on Page 8 of its Brief describes cases invoking the cutoff principle as having been decided "without examination" of the legal issues involved. Specifically, the Respondent refers to **Hart v. Denver Urban Renewal Authority**, 551 F. 2d 1178 (1977); **Save the Courthouse Comm. v. Lynn**, 408 F. Supp. 1323 (1975); and **Committee to Save the South Green v. Hills**, 7 Envt'l L. Rep. 20061, and the decision of the Lower District Court in this case, which the Respondent euphemistically describes as of "questionable validity."

Such a contention by the Respondent amounts to nothing more than its own gratuitous conclusion. In fact, an examination of the above cases indicates that the courts addressed the "cut off date" issue in a clear and concise manner.

> "As we understand it, plaintiff's position is that each and every time there is to be an expenditure pursuant to a prior approval the entire approval machinery wheels must again be set in motion and the approval process repeated. This Court would have to be mad to place such a ludicrous interpretation on the simple clear language employed by Congress in § 470f."
>
> Kent County Council For Historic
> Preservation v. Romney
> 304 F. Supp. 885 (1969)

III.

THE PETITION DOES RAISE QUESTIONS OF FEDERAL LAW SO SUBSTANTIAL AS TO REQUIRE REVIEW BY THE UNITED STATES SUPREME COURT.

The Respondent inaccurately states that the issues in the case at bar only involve the viability of a particular project in Waterbury, Connecticut.

It is evident from the amicus curiae briefs on file with this Court from the Redevelopment Agency of the City and County of San Francisco and the Connecticut Community Development Association that this case involves questions of broad national concern. Futhermore, it is also evident that a decision in this case will have great impact on numerous urban renewal projects throughout the United States involving hundreds of millions of dollars.

The Respondent further argues that the issue presented is a non-recurring one.[1] Such a contention is also inaccurate since the paramount issue in this matter is whether Section 106 of the National Historic Preservation Act is applicable after "the approval of the expenditure of any federal funds on a federal undertaking."

IV.

A DECISION IN FAVOR OF PETITIONER ON THE ISSUE RAISED WOULD PROVIDE PETITIONER WITH RELIEF.

The Respondent states that because Petitioner has only raised the NHPA issue, a decision in its favor would not provide the Petitioner with any relief since the Petitioner would have to comply with the requirements of NEPA, which are substantially the same as NHPA.

The Petitioner raised the following points with reference to NEPA before the Court of Appeals for the Second Circuit:

(1) That in the event NHPA was inapplicable, NEPA was also inapplicable because it would be in conflict with

---

1/ It should be noted that the Community Development Act of 1974 provides that community and development funds can be allocated to urban renewal projects. 42 U.S.C., Section 5305 (a) (10).

the "cut off" requirement of Section 106 of NHPA under this Court's decision in **Flintridge Development Co. v. Scenic Rivers Association**, 426 U.S. 776 (1976);

(2) That the NHPA is the functional equivalent of NEPA, and therefore, NEPA is not applicable in this case; and

(3) That HUD followed its own regulations as approved by the Council on Environmental Quality, and therefore, its determination that an environmental impact statement was not required was not arbitrary or capricious, and was in full compliance with NEPA and satisfied the standard for agency action as set forth in **Hanly v. Kleindienst**, 471 F. 2d 823 (2d Cir. 1972).

The Court of Appeals for the Second Circuit specifically held "that HUD's conduct violated Section 106 of NHPA".

WURA v. WATCH, supra p. 3301

The Second Circuit further stated that:

"Under our construction of NHPA, the other arguments of the parties are essentially mooted. The premise of WURA's arguments relative to NEPA, viz, that NHPA is inapplicable, is false; this its arguments based on the supposed conflict must fail."

WURA v. WATCH
supra, P. 3302

In view of the reasoning of the Second Circuit Court of Appeals, it is Petitioner's position that if this Court should decide the NHPA issue in its favor, the proper procedure would be to remand this case for a decision on the NEPA issues that were not addressed by the Second Circuit Court of Appeals.

However, the Petitioner would also welcome this Court's ruling on the NEPA issues set forth supra. In the event certiorari is granted, the Petitioner will brief and argue the applicability of NEPA as well as NHPA.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully submits that this Petition for Certiorari should be granted.

Respectfully submitted,

JAMES E. HARTLEY, JR.
WILLIAM J. SECOR, JR.
Attorneys for Petitioner